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NOTE

AGE DISCRIMINATION AND POLICE EMPLOYMENT PRACTICES

I. INTRODUCTION

To protect the safety and welfare of the public, police officers are given a great deal of individual discretion; they have the right to use force and to kill if necessary. Police officers are also required to engage in strenuous physical activity and to react quickly under pressure. In the course of a day police officers may be required to perform any of the following activities: pursuing, chasing, subduing, apprehending and restraining suspects; breaking up fights; gaining entry through locked doors and windows; controlling crowds; directing traffic; high-speed driving; lifting and carrying heavy objects; walking “a beat” for long hours, often in adverse weather conditions. In addition, officers must have good eye-hand coordination and manual dexterity to fire their weapons. Such attributes and duties may vary in importance because of geographic, demographic, and societal differences. Police officers are, however, instrumental in keeping law and order in many crises, no matter what the situation or location. Police officers must, therefore, remain both physically and mentally fit throughout their careers.

1. Police officers, although given a great deal of discretion, must nevertheless act within certain constitutional and statutory guidelines. A discussion of these constitutional and statutory guidelines is outside the scope of this note. See generally, K. Davis, Police Discretion (1975).


3. Clearly a police officer working in New York City will be subject to more high pressure situations which require quick thinking and strenuous activity, than will a police officer working in a small, rural, Mid-West town. See Nelson, Age Discrimination in Police Employment, 9 J. of Police Sci. and Ad. 428, 434 (1981).
Many states have set mandatory entry level age limits for becoming police officers in order to achieve a physically and mentally fit police force. These states justify such provisions and regulations by claiming that younger officers are easier to train, more physically fit, more motivated and, therefore, better able to handle the job. Many states also set a mandatory age at which the police officers must retire. The states justification for a mandatory retirement age is that as police officers age, their physical condition and reaction time decline—and in the interest of public safety, older officers are replaced by a younger police force.

Applicants who failed to obtain appointments as police officers because they did not meet the entry level age requirements have brought actions against cities, counties and states which allege that the entry-level age limits violate the fourteenth amendment's equal protection clause and/or the Age Discrimination in Employment Act (ADEA). Police officers who were forced to retire under mandatory retirement provisions have brought similar actions, alleging similar violations.

Only a few courts have considered the issue of minimum and maximum age requirements as they relate to police officers. These courts held that entry-level age limits and mandatory retirement do not violate the equal protection clause. They may, however, violate the ADEA when the applicant or retiree is over 40 and no Bona Fide Occupational Qualification (BFOQ) is found to exist. The court


7. See, e.g., Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984).


10. See cases cited infra note 169.

11. See cases cited infra note 176-77.

12. See cases cited infra notes 29, 34 and 61.

13. Particular jobs or occupations require that persons holding those jobs possess certain
decisions in this area are inconsistent. Some courts have held that the entry level age limits and mandatory retirement age requirements were BFOQs, while other courts have found that such age limits were not BFOQs. The Supreme Court has not decided this issue, therefore, the inconsistencies remain.

This note will explore the case law in the area of age discrimination and law enforcement personnel. It will touch upon the equal protection issue, but its primary focus will be on the ADEA issue. The note will include a discussion of the purpose and goals of the ADEA; elements and burdens of proof in an action under the ADEA; and the standard of proof required to establish a BFOQ exception. Additionally, this note will examine some of the inconsistencies created by decisions in this area of the law, and will offer and discuss some proposals for reform.

II. Equal Protection Clause

The fourteenth amendment provides that “[n]o State shall make or enforce any law which shall ... deny to any person ... equal protection of the laws.” Any state statute which violates this amendment will be stricken as unconstitutional. When a court subjects a state statute to a fourteenth amendment analysis, it will apply either a “strict scrutiny” test or a “mere rationality” test. Strict scrutiny is used when the statute affects a “suspect class” or a “fundamental right.” It requires that the regulation in question

skills. For example, a lifeguard must know how to swim; a longshoreman must be able to lift heavy loads; and a bus driver must know how to drive. If a particular skill is necessary for the performance of a particular job, that skill is known as a bona fide occupational qualification (“BFOQ”).

14. See cases cited infra notes 170-77 and accompanying text.
15. Id.
17. See generally NOWAK, ROTUNDA AND YOUNG, CONSTITUTIONAL LAW 585-86 (West 1983).
18. Suspect classes are classifications based on race and national origin. See United States v. Carolene Products, 304 U.S. 144 (1938). The Supreme Court has treated classifications based on gender, alienage and illegitimacy as semi-suspect classes, which are subject to a review falling short of strict scrutiny, but something more than mere rationality. See Reed v. Reed, 404 U.S. 71 (1971) (gender); Plyler v. Doe, 457 U.S. 202 (1982) (alienage); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy).
19. There are two general classes of fundamental rights. The first is those rights independently guaranteed by constitutional provisions apart from the equal protection clause, for example, the right of interstate migration. See Shapiro v. Thompson, 394 U.S. 618 (1969). The second is those rights which are not independently and explicitly given by other constitutional provisions, but which are felt to be both important and implicitly granted by the Constitution. For example, the right to vote is a fundamental right. See Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
further a compelling state interest and that it (the state interest) be advanced through the least restrictive means. Most statutes subject to strict scrutiny are held unconstitutional.

Because age is not a suspect class, nor is the right to government employment a fundamental right, statutes which regulate the hiring and retirement of police officers will be subject to the more relaxed "mere rationality" standard. The "mere rationality" standard requires only that the statute be rationally related to a legitimate state interest. Courts are reluctant to overturn statutes which are subject to this standard.

Applicants who were denied employment as police officers because they were too old, and officers forced to retire, argue that the state laws regulating entry level age requirements and mandatory retirement deny them the opportunity for employment solely because of their age and, therefore, denies them equal protection of the law. Courts, however, have uniformly rejected this argument.

**A. Entry level Age Limitations**

Only a few courts have addressed whether entry level age requirements violate the equal protection clause. In *Hahn v. City of*...

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while the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. But even old age does not define a "discrete and insular" group in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span.

*Id.* at 313-14 (citations omitted).

23. Id.

24. Id.

25. Id.


27. See cases cited infra notes 29, 34 and 61.

28. *Id.*

Buffalo, a district court in New York held that section 58(1)(a) of the New York State Civil Service Law did not violate the equal protection clause. The plaintiff, in Hahn, also argued that section 58(1)(a) violated the ADEA. Section 58(1)(a) prohibits the appointment of any person as a police officer of a county, city, village or town who is “less than twenty nor more than twenty-nine years of age.” The plaintiffs, in Hahn, were denied appointments as police officers to the Buffalo Police Department because they were over the age of 29.

In New York, prior to the Hahn case, courts decided cases challenging section 58(1)(a) summarily. In Hahn, however, the plaintiffs pointed out two exceptions to section 58(1)(a) which supported their contention that section 58(1)(a) was not rationally related to a legitimate state interest.

One exception permits time spent in the military to be subtracted from the age of the applicant up to six years. This exception would consequently permit an applicant who spent time in the military to be hired at age 35. The second exception permits the age limit to be temporarily raised to thirty-five (35) when “aggravated
recruitment difficulties" cause personnel shortages. The court held that the evidence presented in this case indicated that the number of persons appointed under the military exception was relatively small and that the second exception was an emergency provision.

The court further held that these two exceptions were not inconsistent with the defendant's position that young officers are necessary for the operation of a safe and efficient police department.

The evidence presented at the trial showed that: (1) younger officers were easier to train, were more highly motivated, and better able to perform difficult assignments; (2) the average "street life" of a police officer was ten years; and (3) physical capabilities tend to decline somewhat after age 29. Based on this evidence, the Hahn court held that this statute did not violate the equal protection clause because it was rationally related to the legitimate state interest of maintaining an efficient and safe police force.

The plaintiffs in the case of Colon v. City of New York also challenged section 58(1)(a) on the ground that it denied them equal protection of the law because they were rejected for the position of New York City Housing Authority police officer solely because they were over 29 years. The City of New York, in support of section 58(1)(a), claimed that "the increase in public safety that is secured

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38. Id. Section 58(d)(1)(a) provides in pertinent part that:
   1-a. Notwithstanding the provisions of subdivision one of this section, upon request of a municipal commission . . . , and upon a showing . . . that aggravated recruitment difficulties are causing a serious shortage of police officers . . . , the state commission may increase the maximum age to thirty-five years of age for a period not exceeding two years from the date of such determination. . . .


40. Id.

41. Id.

42. Id. The court reasoned that the issue before the court was not whether the court believed the facts and inferences which the defendant raised to justify the enactment of section 58(1)(a) were true. Rather, the question was whether such facts could "reasonably be conceived to be true by the governmental decision maker." Id. (citing Vance v. Bradley 440 U.S. 93, 111 (1979)).

The court concluded that:

The facts upon which the age classification is apparently based are believable. Taken as true, they would indicate that the age requirement of section 58(1)(a) is rationally related to the goal of maintaining an efficient and safe police department. Therefore, section 58(1)(a) does not deny the plaintiffs equal protection of the laws.

Id. at 949.

43. 535 F. Supp. 1108 (S.D.N.Y. 1982). The plaintiffs in Colon took and passed the written examination for appointment to the New York City Housing Authority Police Department in 1973. At that time they were under the age of 29. Their names were not reached on the eligibility list until 1979. The plaintiffs, however, were rejected because at this time they were over 29.
by fielding the most physically capable and active police force possible, and the administrative advantages of a younger police force which include more years of service, lighter burden on disability and pension systems, and more adaptability in new recruits" were legitimate state interests. The State of New York cited similar interests. Both defendant's therefore argued that the age limitation was rationally related to these legitimate state interests. Subsequently, the court held that it was constitutional to apply the rationality standard to section 58(1)(a).

In Doyle v. Suffolk County, and its companion case, Hettinger v. Nassau County Civil Service Commission, the Second Circuit Court upheld the district court's reasoning in Hahn. The Second Circuit Court explained that although it is likely that many persons above the age of 29 could perform adequately as police officers, the legislature could rationally believe that the ability of an applicant to perform the duties of a police officer will decline after 29 years. The court held that once the decision was made to draw the line at age 29, the decision was rational. The court reasoned further that "in a case like this, 'perfection is by no means required'." Furthermore, "the legislature was entitled to consider the advantages of limiting appointment to those more likely to remain physically able to perform the duties of a police officer for a substantial period of

44. Id. at 1113.
45. Id. The State of New York intervened as a defendant for the limited purpose of defending the constitutionality of section 58(1)(a). Id. at 1111. The State of New York cited as legitimate state interests:
the extraordinary effort that police positions require, and administrative interests which include more potential years of service; lighter economic demands on pension and retirement systems, and facilitation of pension planning and management.

46. 535 F. Supp. at 1113.
47. Id.
48. 786 F.2d 523 (2d Cir. 1986).
49. Id.
50. Id. at 529.
51. Id. at 528. The court stated that:
the legislature could rationally conclude that individual physical testing of all those 29 and older would yield a proportionately smaller group of qualified candidates than testing of those between 20 and 29. The legislature could therefore decide that the limited financial resources of the state's communities would be best used if physical testing was undertaken only among the group most likely to yield qualified candidates.

52. Id. "The obvious state interest sought to be advanced by the maximum age provision is the recruitment of police personnel physically able to discharge their duties." Id.
The court also expressly addressed and dismissed the issue of whether the exceptions to section 58(1)(a) render it irrational. The Fourth Circuit Court addressed the equal protection issue in *Arritt v. Grisell*. In *Arritt*, the court held that a West Virginia statute, establishing a 35 year age limit for police officer applicants, was constitutional. The court found that West Virginia had a legitimate interest in assuring that the police were physically fit and that the 35 year age limit was rationally related to that interest.

The burden on a plaintiff asserting an equal protection claim is heavy. The plaintiff must "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." This burden is not easily met because the defendant is only required to show that the legislature, in enacting an age limitation for police officers, had a reasonable belief that the facts justifying such age limitations were true. Because these statutes are subject only to a mere rationality review, which is easily met since there is a legitimate state interest in maintaining a young, efficient police department, it is unlikely that entry-level age limit statutes will fall on equal protection grounds.

B. Mandatory Retirement

Since the Supreme Court's decision in *Massachusetts Board of Retirement v. Murgia*, virtually all cases involving mandatory retirement ages for police officers are brought on the ground that they violate the ADEA. In *Murgia*, the Court upheld a Massachusetts statute which requires mandatory retirement for uniformed state police officers at the age of 50. The Massachusetts State Police re-

54. *Id.* The court reasoned that since mandatory retirement at age 50 had been upheld in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), New York could prohibit appointment beyond age 29 with the hope of receiving 20 years of service before an officer reaches 50. *Id.*
55. *Id.* at 529.
56. 567 F.2d 1267 (4th Cir. 1977). State courts have also held that entry-level age provisions do not violate the equal protection clause. See, e.g., Ridaught v. Division of Fla. Highway Patrol, 314 So.2d 140 (Fla. 1975); Sobieralski v. City of South Bend, ___ Ind. App. ___, 479 N.E.2d 98 (Ind. Ct. App. 1985).
57. 567 F.2d at 1272.
58. *Id.*
60. *Id.*
62. See cases cited infra notes 176-77.
63. 427 U.S. at 317.
quired all police officers under the age of 40 to pass biennial comprehensive physical exams. Thereafter, officers were required to pass a more rigorous annual exam until reaching the age of 50. Murgia, the plaintiff, passed all the physical exams and was in excellent physical and mental health. The Massachusetts Board of Retirement, nevertheless, retired him at the age of 50.

The Court found that the state had a legitimate interest to protect the public by ensuring that state police officers could respond to the demands of their job. The Court reasoned that, although particular individuals over 50 years of age could perform the functions of a police officer, the evidence presented clearly established that the risk of cardiovascular failure and the effects of stress increased with age. The Court, applying the mere rationality standard, found that this statute was rationally related to a legitimate state interest.

In light of the Murgia decision, it is unlikely that any state statute or policy on mandatory retirement will be stricken for violating the equal protection clause. Such requirements, however, may nevertheless fail on ADEA grounds.

III. AGE DISCRIMINATION AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA), to protect persons between the ages of 40 and 65 from discrimination in employment. In 1986, the age limitation was amended and the age ceiling was eliminated. The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment. . . ." The ADEA is aimed at reducing unemployment, welfare and waste which result from the under-utili-

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64. Id. at 314.
65. Id.
66. Id. at 312.
67. See cases cited infra notes 176-77 and accompanying text.
69. Pub. L. No. 99-592, 100 Stat. 312 (1986) ("The prohibitions in this Act [ADEA] . . . shall be limited to individuals who are at least forty years of age.").
70. 29 U.S.C. § 621(b)(1982), section 621(b) states:
   It is therefore the purpose of this Act [29 USCS §§ 621 et seq.] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Id.
zation of experienced workers. Additionally, the ADEA seeks to alleviate the economic, psychological and health problems faced by the victims of age discrimination.

Prior to 1974, the ADEA did not apply to state and local governments. In 1974, Congress amended the ADEA's definition of "employer" to include states and agencies and political subdivisions of a state. This amendment was criticized and challenged as unconstitutional. Those challenging this amendment drew support from the Supreme Court's decision in National League of Cities v. Usery, which invalidated the extension of the Fair Labor Standards Act (FLSA) to state and local governments. The Court, in National League of Cities, held that the commerce clause did not empower Congress to enforce the provisions of the FLSA against states "in areas of traditional governmental functions." These challengers argued that the ADEA's extension to cover state and local governments was likewise an unlawful exercise of Congress' power under the commerce clause because essential public safety decisions were a traditional government function. The courts, however, rejected this argument.


The enactment of ADEA, and the subsequent amendments, reflect a national awareness of the injustice that age discrimination imposes upon "elderly" citizens. Congressional testimony surrounding the passage of this statute suggests two central purposes, to wit, the reduction of unemployment, welfare, and waste which accompanies the underutilization of experienced workers; and, the alleviation of economic, psychological and health problems faced by the individual victims of discrimination.


72. See infra note 79 and accompanying text.


75. See infra note 79 and accompanying text.

76. See, e.g., EEOC v. County of Los Angeles, 706 F.2d 1039, 1041 (9th Cir. 1983); See also infra note 79 and accompanying text.

In 1983, the Supreme Court, in *EEOC v. Wyoming*, held that the ADEA's extension to state and local governments was a valid exercise of Congress' power under the commerce clause. *EEOC v. Wyoming*, involved a Wyoming statute that required game and fish wardens who had law enforcement responsibilities to retire at age 55. The Court distinguished this case from *National League of Cities* by stating that although the management of state parks is clearly a traditional state function, the degree of intrusion into States' rights was less serious than was the intrusion in *National League of Cities*.

The Court, in reaching its conclusion, relied on its decision in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.* The Court, in *Hodel*, stated that there are three requisites which states must satisfy before they will receive immunity from the legitimate exercise of federal authority to regulate commerce, under the reasoning of *National League of Cities*.

First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

The Court further stated that even if these three requirements are met, it does not mean that the challenge to Congressional action will succeed. There are situations when the federal interest advanced by particular legislation will override the States' interest to be free from federal interference.

In 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, and held that...
Congress may validly extend the FLSA to state and local governments. It is now clear that state and local governments must abide by the standards set forth in both the FLSA and the ADEA.

A. Standard of Proof Under the ADEA

Section 4(a) of the ADEA makes it unlawful to refuse to hire or to discharge any individual because of age, or to otherwise discriminate because of age, in compensation, conditions or privileges of employment.\(^{89}\) Section 4(f)(1), however, allows an employer to discriminate on the basis of age, when age is a BFOQ reasonably necessary to the normal operation of the particular business, or when the employer's decision is based upon reasonable factors other than age.\(^{90}\)

The plaintiff, in an action under the ADEA, bears the initial burden of proof to establish a prima facie case of age discrimination.\(^{91}\) A plaintiff establishes a prima facie case of age discrimination by showing that: (1) he belongs to the protected class; (2) he applied for or was qualified for a particular position; (3) the employer did not hire him; and (4) the employer, instead hired a younger employee.\(^{92}\) The burden of production then shifts to the defendant (em-
ployer) to show that there was a legitimate non-discriminatory reason for the defendant’s decision. If the employer meets his burden, the plaintiff (employee) then must be given the opportunity to prove by the preponderance of the evidence that the employer’s reason was merely a pretext. If an employer should invoke the BFOQ exception in response to the prima facie case, the employer bears the burden of production and of persuasion, to prove age is a BFOQ.

1. Standard of Proof for a BFOQ Defense

It is easy for a plaintiff to establish a prima facie case of age discrimination in cases where a law enforcement agency refuses to hire or forces the retirement of a police officer because the plaintiff has reached the statutory age limit. In many instances, the employer will concede that age was the basis for the decision. Therefore, it becomes necessary for the law enforcement agency to defend its decision on the grounds that age is a BFOQ.

Usery v. Tamiami Travel Tours, Inc. formulated a two pronged test which set the standard for when age will constitute a BFOQ. The Tamiami test places the burden on the employer to show that:

(1) that the BFOQ which it invokes is reasonably necessary to the

job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications....

411 U.S. at 802-05. See also EEOC v. County of Allegheny, 519 F. Supp. at 1331-32. The courts that adopted this test stressed that it was not to be applied rigidly in age discrimination cases. EEOC v. County of Allegheny, 519 F. Supp. at 1332. One court stated:

[We conclude that the operative principles behind McDonnell Douglas are applicable in age cases as in Title VII cases, but that the McDonnell Douglas formula... does not set forth immutable guidelines for the decision of all discrimination cases. Rather, it is applicable to a greater or lesser degree in varying circumstances; the judge should understand its basis and apply it functionally as circumstances warrant.

Loeb v. Textron, Inc., 600 F.2d 1003, 1010 (1st Cir. 1979).

93. There was some disagreement among the circuits as to what burden shifted to the defendant. See generally Launote, The Age Discrimination in Employment Act of 1967, 90 HARV. L. REV. 380, 388-400 (1976). This disagreement, however, was resolved by the Supreme Court in Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981). In Burdine, the Court reexamined the McDonnell Douglas test and found that the only burden of production that shifts to a defendant is to rebut the presumption raised by the plaintiff’s prima facie case. 450 U.S. at 254.

94. See EEOC v. County of Allegheny, 519 F. Supp. at 1331.


96. 531 F.2d 224 (5th Cir. 1976).
essence of its business (here the operation of an efficient police department for the protection of the public), and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individual basis.97

In Arritt v. Grisell,98 the Fourth Circuit Court applied the Tamiami test to cases involving age discrimination and law enforcement personnel. Since Arritt, a number of circuit and district courts have also applied the Tamiami test to age discrimination cases involving police officers.99 Furthermore, the Supreme Court has explicitly adopted the Tamiami test in cases where an age based qualification is justified by considerations of safety.100

Whether age is a BFOQ is a question of fact.101 Courts applying the Tamiami standard to justifications and evidence offered in defense of maximum hiring age and mandatory retirement provisions for police officers as BFOQ's have reached different results.102

For a public employer to satisfy the first prong of the Tamiami test, it must show that age is a “reasonably necessary” qualification for the safe, efficient operation of a police department which can protect the public.103 Police departments raise many justifications in

97. Arritt v. Grisell, 567 F.2d at 1271. This test is known as the Weeks-Diaz test. The validity of the age restriction is examined under the Weeks prong, and the necessity of the requirement of the employers business is examined under the Diaz prong. Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969). See also Usery v. Tamiami Travel Tours, Inc., 531 F.2d 224, 228 (5th Cir. 1976); Nelson, supra note 3, at 435 n.2.
98. 567 F.2d 1267 (4th Cir. 1977).
102. See cases cited supra note 99, and accompanying text.
defense of age limits for police officers, in both entry-level age and mandatory retirement cases. One such justification is based on the relationship between age and physical condition. Employers assert that police employment is a physically and mentally demanding job which entails working long hours in adverse, high pressure circumstances. Police departments also claim that older individuals lack the physical and mental agility and the stamina required to be an effective officer, because a person's physical and mental skills and abilities decline with age. Police departments, therefore, claim that younger individuals are more physically and mentally capable of being effective police officers.

Subjective opinions that older officers do not handle the job as well as younger officers are not sufficient evidence to prove that age is a BFOQ. General evidence on the debilitating effects of age or the tendency of physical capabilities to decline with age is also not sufficient evidence to make age a BFOQ. To give weight to such opinions and evidence would lend credibility to "precisely the stereotypical thinking the ADEA was designed to prevent." Rather, the effect of age on the ability to perform as a police officer must be demonstrated by specific, objective, factual evidence.

104. See, e.g., EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1984).
105. Id. at 1094-95. Justice Higginbotham stated in a concurring opinion: the reality [is] that we accept the factual and legal validity of using age as a prediction of certain physical and agility skills, the inquiry being largely the correspondence between the specific age and the specific skill requirement, and we accept that age does so in such a sufficiently efficient manner that its use is not necessarily suspect.
106. Id. at 1094-95.
107. Id.
108. Id. at 1094.
111. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 234 (5th Cir. 1976).
112. See EEOC v. Missouri State Highway Patrol, 748 F.2d 444, 449 (8th Cir. 1984); EEOC v. Pennsylvania, 596 F. Supp. 1333, 1338 (M.D. Pa. 1984), vacated, 768 F.2d 514 (5th Cir. 1985); EEOC v. University of Texas Health Science Center, 710 F.2d at 1094; EEOC v. County of Santa Barbara, 666 F. Supp. 977, 980 (C.D. Cal. 1987).
Bare assertions about the relationship between age and the ability to perform, without more, will not be sufficient to establish a BFOQ. A question still remains, however, of how much proof is necessary to establish that age is a BFOQ. For example, in *EEOC v. University of Texas Health Science Center*, the court found a doctor's testimony persuasive evidence that age was a BFOQ for hiring police officers. The doctor testified, "'that there is a deterioration both physiologically and psychologically which is contributable to the process of aging' and that 'age statistically proved to be a prominent factor in one's individual physical condition.'" This testimony was combined with the testimony of two police chiefs that physical fitness is a very important aspect of police training and that a street officer's effectiveness diminished considerably with age. Further support was given with the testimony of an industrial psychologist that supervisory skills, proficiency at pursuit driving, physical agility and marksmanship declined as officers reached age forty. Both testimonies were sufficient to satisfy the "reasonably necessary" prong of *Tamiami*.

In *Hahn v. City of Buffalo*, however, the testimony of law enforcement experts that older officers tend not to be selfstarters; tend to recover from injuries less quickly; tend not to handle crisis situations well; and are more likely to have to resort to the use of deadly force than younger more physically fit officers was not sufficient to make age a BFOQ. In light of conflicting testimony that officers over the age of 40 are serving in police departments and doing competent work and that some officers in their forties and fifties can out-perform officers in their twenties or thirties, the court held that the city of Buffalo did not prove that age is a BFOQ for hiring police officers.

Case law does not resolve the issue of how much evidence or proof is necessary to establish that age is a BFOQ for the hiring and retirement of police officers. The cases do show, however, that at least medical testimony concerning the effects of the aging process...
on the abilities of police officers to perform their duties, combined with factual data on the relationship between age and ability to perform, should be introduced as evidence when arguing that age is a BFOQ. 120

Another justification raised by proponents of age limits for police officers is public safety. 121 Employers assert that because the occupation of police officer concerns public safety, this safety factor should lighten the burden of establishing a BFOQ. 122 Virtually all the courts hearing this issue have rejected it. 123 Safety considerations are built into the first prong of the Tamiami test; that is, safety will be considered in determining if age is a reasonably necessary qualification to the operation of the business 124 (the greater the likelihood of the severity of harm, the more restrictive the job requirements could be). 125

A third argument asserted by employers is that age should be a per se BFOQ for police employment. 126 Employers base this argument on the fact that a court has held that the federal laws regulating entry level age limits 127 and mandatory retirement provisions 128

120. See supra notes 107-118 and accompanying text.
121. See infra note 123.
122. See cases cited infra note 123.
123. See EEOC v. New Jersey, 620 F. Supp. at 981. The court in New Jersey reasoned that "when an alleged BFOQ concerns the public safety, '[t]he uncertainty implicit in the concept of managing safety risks always makes it reasonably necessary' to err on the side of caution in a close case." See also EEOC v. University of Texas Health Science Center, 710 F.2d 1091, 1097, (5th Cir. 1983); EEOC v. County of Santa Barbara, 666 F.2d 373, 377 (9th Cir. 1982); Beck v. Borough of Manheim, 505 F. Supp. 923 (E.D. Pa. 1981); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); contra Hodgson v. Greyhound Lines, Inc., 449 F. Supp. 859 (7th Cir. 1974). The court in Hodgson held that the employer who is engaged in inherently dangerous activities, or whose business is primarily safety related, need only show "a minimal increase in risk of harm" to establish a BFOQ defense. Hodgson, 499 F. Supp. at 863. (This case involved a mandatory hiring age for bus drivers).
124. In Santa Barbara, 666 F.2d 333 (9th Cir. 1982), the court stated that: when safety is 'the essence' of the particular business, that factor obviously becomes an important occupational consideration. Consequently, employers whose businesses are safety related have less difficulty proving that age is a BFOQ. Nevertheless, courts cannot assume, in the absence of any evidence as to its effects on safe performance, that age, per se constitutes a BFOQ. Id. at 377.
125. Usery v. Tamiami Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976).
126. See Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985); EEOC v. Missouri State Highway Patrol, 748 F.2d at 457; Heiar v. Crawford County, 746 F.2d 1190, 1198 (7th Cir. 1984); EEOC v. County of Los Angeles, 706 F.2d 1039, 1041 (9th Cir. 1983); Galvin v. Vermont, 598 F. Supp. 144, 149 (D. Vt. 1984).
128. The head of any agency may, with the concurrence of such agent as the President may designate, determine and fix the minimum and maximum limits of age within which an original appointment may be made to a position as a law enforce-
for federal law enforcement officers do not violate the ADEA. In 1978, Congress amended the ADEA and eliminated virtually all age limits for federal employees, except those pertaining to federal firefighters and law enforcement personnel. An argument has been made that if Congress concluded that certain age limits were BFOQs for federal law enforcement officers, then these same type of age limits should apply to state police officers.

The Supreme Court in Johnson v. Mayor of Baltimore, a case involving mandatory retirement for Maryland firefighters at age 55, explicitly rejected this argument. Other courts have also rejected this argument. The plaintiffs, in Johnson, six firefighters, challenged the City of Baltimore's provision that requires firefighting personnel below the rank of lieutenant to retire at the age of 65. The City of Baltimore, relying on a provision which requires federal firefighters to retire at the age of 55, argued that because Congress has set the retirement age at 55 for federal firefighters, as a matter of law, age should constitute a per se BFOQ for all state and local firefighters. The Court, after a review of the legislative history of the federal provisions regulating mandatory retirement of firefighters and law enforcement personnel, found that Congress never intended the age requirements to constitute BFOQs. Rather, "[t]he history

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A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

130. 29 U.S.C. § 631(b)(1982). The 1978 Amendments eliminated virtually all age limits on federal employment. The provisions relating to federal firefighter and law enforcement personnel, however, remained in effect. Therefore, these federal employees are required to retire at the age of 55, despite the provisions of the ADEA. See Johnson v. Mayor of Baltimore, 131. See EEOC v. County of Los Angeles, 706 F.2d at 1041.
133. See cases cited supra note 126.
134. ___ U.S. at ___, 105 S. Ct. at 2721.
135. Id. at ___, 105 S. Ct. at 2723-26.
demonstrates instead that Congress has acted to deal with the idiosyncratic problems of federal employment.

Courts have also addressed the issue of whether the BFOQ analysis should apply to the particular activities of a particular employee or category of employees, or whether the analysis should apply to the generic class of law enforcement officers. This issue concerns the interpretation of the phrase "particular business" contained in the BFOQ exception. The courts are divided over this issue. One line of reasoning is that Congress intended that employment decisions should be made based on the ability of the employee rather than his age. A decision based on a generic class would frustrate the purpose and goals of the ADEA. Another line of reasoning is that the plain meaning of the term should apply. The middle of the road approach recognizes that in some instances specific occupations with different qualifications may exist in one business, and, therefore, each situation must be examined to determine how the BFOQ standard should apply. This is not true, however, for police

136. Id. at ---, 105 S. Ct. at 2723.
137. See cases cited infra notes 141-46.
138. Id.

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.

Id.

140. See cases cited infra notes 141-46 and accompanying text.
141. EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982).
142. Id. In St. Paul, the court reasoned that:

[i]t would be inconsistent with the goal of ability-based decisions to allow a city to retire a fire chief or a police chief who was completely able to fulfill the duties of another position within the department, such as a fire captain or patrolman. . . . We cannot believe that the ADEA was intended to allow a city to retire a police dispatcher because that person is too old to serve on a SWAT team.

Id. at 1165-66.

143. EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980).
144. Id. at 1258.
145. See Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984); EEOC v. Pennsylvania, 596 F. Supp. 1333, 1343 (M.D. Pa. 1984). In Mahoney, the court reasoned that:

[a]lthough we can understand why courts have interpreted the statute differently,
employment because the duties of a police officer must be taken as a whole.\textsuperscript{146}

One final issue is whether an intent requirement should be read into the \textit{Tamiami} test. Plaintiffs can argue that the age limits are arbitrary and were not chosen with the intent to insure that a person has the ability to perform the job.\textsuperscript{147} The courts, however, have rejected this argument.\textsuperscript{148} These courts reason that age limits should be analyzed based on the objective evidence presented at trial, rather than on the subjective motivation of the employer.\textsuperscript{149}

Under the second prong of the \textit{Tamiami} test, the employer must demonstrate one of two things; that all or substantially all of the applicants or retirees over the particular age limit are unable to safely and efficiently perform the duties of police officer, or that it is impossible or impractical to deal with those persons on an individualized basis.\textsuperscript{150} This prong can be satisfied using the objective medical

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\textsuperscript{146} We think that our interpretation is faithful to the words—that ‘occupational qualification’ means more of a recognized and discrete vocation rather than a desk assignment for an employee subject to all the obligations and benefits of quasi-military organization. We also feel, as indeed the district court conceded, that a contrary interpretation, which permits a particularistic analysis of the actual duties performed to overcome an otherwise justified BFOQ for similarly classified employees, would raise immeasurable problems of morale, administration, litigation and adjudication.

\textsuperscript{147} \textit{Mahoney}, 738 F.2d at 39. The court stated:

\textit{...when, however, a person signs up in a paramilitary uniformed force, where one is subject to generally unrestricted reassignment and performance of the most strenuous duties in any emergency, and under goes the military training required of all recruits, with the expectation of receiving special pension and disability benefits, we would be loathe to equate particular “assignments”, even if of long duration, to “occupations”...}

\textit{Id.}

\textsuperscript{148} \textit{Id.} See also \textit{Heiar v. Crawford County, 746 F.2d at 1201; Kossman v. Calumet County, 600 F. Supp. at 177; EEOC v. Pennsylvania, 596 F. Supp. at 1344.}

\textsuperscript{149} The Fifth Circuit Court in \textit{EEOC v. University of Texas Health Science Center} stated:

\textit{...we think it wiser to interpret the test as requiring the defendant to demonstrate at trial, with objective evidence, that the age qualification is justified, rather than looking at the subjective motivation originally behind the qualification. . . . We therefore interpret \textit{Tamiami’s} requirements for an age BFOQ as not inviting judicial safaris into the overgrowth of human emotion and intent.}

\textit{710 F.2d at 1091, 1096 (emphasis in original).}

\textsuperscript{150} \textit{Arritt v. Grisell, 567 F.2d at 1271.}
and/or factual evidence produced to satisfy the first prong. The objective factual evidence introduced to satisfy the first prong of the Tamiami test must, however, show that age has a significant impact on a person's ability to perform. Therefore, if the court finds that age is a reasonably necessary factor for the safe, efficient operation of the police department, then it follows that in most cases persons over that age limit will not be able to safely and efficiently perform the duties of a police officer. This argument does not lose merit just because a police officer is permitted to work past the age limit once he has been hired, because the experience gained from time spent on the police force compensates for the decline of physical abilities with age.

The second prong of the Tamiami test may be more difficult to prove. Economic considerations may not be used to justify the non-feasibility of individual testing because such economic considerations "were among the targets of the Act (ADEA)." Because applicants for the position of police officer are generally required to go through individual physical testing, the notion that individual testing would be too difficult is not valid. Rather, it must be shown that despite individual testing, it would be difficult to determine whether a candidate of a certain age would perform the job efficiently and that the results of the tests would be uncertain.

2. Reasonable Factors Other Than Age

The second exception contained in section 4(f)(1) of the ADEA permits an employer to refuse to hire or to discharge an employee if the decision is based on "reasonable factors other than age." The "reasonable factor" standard can not be given a precise definition or scope. The reasonableness of the factors upon which an employment decision is based will be determined on a case by case basis. The purpose of the ADEA is not to require the employment of anyone regardless of age, who may be otherwise unqualified. Age need not be the sole reason for a discharge or refusal to hire to establish age discrimination under the ADEA. Rather, it need only be a "deter-

151. Id.
152. See supra notes 103-120 and accompanying text.
153. See, e.g., EEOC v. County of Los Angeles, 706 F.2d at 1043.
154. Id. at 1042; see also Galvin v. Vermont, 598 F. Supp. at 149.
156. See supra note 90.
158 29 C.F.R. § 860.103(b) (1985).
minative factor" in the employer’s decision.160

The United States Secretary of Labor has listed various factors which might support a defense under the “reasonable factor” exception.161 Some of these factors include physical fitness if reasonably

679 (3d Cir. 1983).

160. 519 F. Supp. at 1335. See also 29 C.F.R. § 860.103(c) (1985).

161. See 29 C.F.R. § 860.103(f), which provides:

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age.

(1)(i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: Provided, however, that such standards are reasonably necessary for the specific work to be performed and are uniformly applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer’s assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production or educational level, would be acceptable for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

See also 29 C.F.R. § 860.104(b) and (c) (1985), which provides:

http://scholarlycommons.law.hofstra.edu/hlelj/vol4/iss1/5
necessary and uniformly applied; amount and quality of production; educational levels if shown to have a valid relationship to job requirements and are uniformly applied; use of validated tests; and refusal to hire relatives of current employees. Furthermore, the courts have held that chronic tardiness, an inability to do the job, and the elimination of a position are reasonable factors where an employee was within the protected age group.

The "reasonable factor" standard is difficult to prove in a case which involves age discrimination of police officer applicants or retirees because age limits are set by statute, and thus, the employer will make a decision based on age. It has been argued, however, that the state statute mandate was a reasonable factor other than age. The courts have rejected this argument. EEOC v. Wyoming, held that the ADEA does apply to state and local governments, and because under the supremacy clause a state statute which conflicts with a federal statute cannot stand, any reliance on the state statute cannot

(b) Employee testing. The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) Refusal to hire relatives of current employees. There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

162. Id.
165. Moses v. Falstaff Brewing Corp., 550 F.2d 1113 (8th Cir. 1977).
166. See EEOC v. Missouri State Hwy Patrol, 748 F.2d at 449-50; EEOC v. County of Allegheny, 705 F.2d at 681; EEOC v. Pennsylvania, 596 F. Supp. at 1338. In Missouri, the court reasoned that, "legislative determination [is] not entitled to a presumption of correctness, but '[t]his is not to say that a legislative declaration is not entitled to considerable deference.'" 748 F.2d at 449 (citing EEOC v. City of St. Paul, 671 F.2d at 1167).
167. See cases cited supra note 166.
justify employment discrimination.168

B. Inconsistencies Created by the Application of BFOQ Standards

Only six circuits have heard the issue of whether entry-level age limits violate the ADEA, or whether they constitute a BFOQ.169 Of these six, the Second,170 Third171 and Ninth172 Circuits have held that because no BFOQ was established, entry-level age limits violate the ADEA. Despite these holdings, these courts stated that their decisions would not preclude the government from attempting to establish age as a BFOQ for hiring police officers at another time and with additional evidence.173 The Fifth174 and Eighth175 Circuits held that there was sufficient evidence to establish age as a BFOQ and, therefore, no ADEA violation was found.

Only three circuits176 and a number of district courts177 have had the opportunity to examine mandatory retirement provisions in light of the ADEA. These courts have also reached inconsistent deci-

168. See EEOC v. County of Allegheny, 705 F.2d at 682; EEOC v. County of Santa Barbara, 666 F.2d at 378.
169. Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985); EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984); EEOC v. County of Allegheny, 705 F.2d 679 (3d Cir. 1983); EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983); EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1981); Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977) (remanded to district court for further findings of fact on issue of BFOQ).
170. Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985).
171. EEOC v. County of Allegheny, 705 F.2d 679 (3d Cir. 1983).
172. EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983).
173. See, e.g., EEOC v. County of Allegheny, 705 F.2d at 681.
174. EEOC v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1981).
175. EEOC v. Missouri State Highway Patrol, 748 F.2d 447, 450 (8th Cir. 1984).
176. Heiar v. Crawford, 746 F.2d 1190 (7th Cir. 1984) (age 55 not a BFOQ for retirement); Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984) (age 50 a BFOQ for retirement); EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982) (age 60 not a BFOQ for retirement).
177. EEOC v. New Jersey, 620 F. Supp. 977 (D.N.J. 1985) (involved application for injunction enjoining defendant from retiring police officers at age 55; injunction denied because likely success on the merits that age 55 would be found to be a BFOQ); Kossman v. Calumet County, 600 F. Supp. 175 (E.D. Wis. 1985) (age 55 not a BFOQ for retirement); Popkins v. Zagel, 611 F. Supp. 809 (C.D. Ill. 1985) (age 60 is BFOQ for retirement); EEOC v. Pennsylvania, 596 F. Supp. 1333, (M.D. Pa. 1984), vacated and remanded, 768 F.2d 514 (3d Cir. 1985) (district court found age 60 was BFOQ for retirement); EEOC v. City of Minneapolis, 537 F. Supp. 750 (D. Minn. 1982) (age 65 not a BFOQ for retirement of police captains); Beck v. Borough of Manheim, 505 F. Supp. 923 (E.D. Pa. 1981) (age 60 BFOQ for retirement); EEOC v. City of Janesville, 480 F. Supp. 1375 (W.D. Wis. 1979), rev'd and remanded, 630 F.2d 1254 (7th Cir. 1980) (age 55 was not a BFOQ for retirement).
The First Circuit has found that sufficient evidence was presented at trial to establish a BFOQ. The Seventh and Ninth Circuits, however, held to the contrary.

The question of whether a BFOQ exists is a question of fact, so the decisions will turn on the amount of evidence produced at trial. "It seems somewhat anomalous for the lawfulness of maximum age limits on police hiring to depend on the particular evidence presented at various court trials throughout the country." It is paradoxical that in Pennsylvania, age 35 is not a BFOQ for hiring police officers, while in Missouri, age 32 is a BFOQ for hiring police officers, or that in Massachusetts, age 50 is a BFOQ for retirement of police officers while in Wisconsin, age 55 is not a BFOQ.

These decisions not only create inconsistencies among the states but may create inconsistencies within a state. This may result because one county or local government produces more evidence than another and, therefore, it would be possible to have established a BFOQ in one location within a state and not in a different location within that state based on the same exact state statute.

Furthermore, because maximum hiring age and mandatory retirement provisions can be challenged on both equal protection grounds and ADEA grounds, a statute maybe constitutional, but may nevertheless violate the ADEA. The most troubling decision in this area has been that in Hahn v. City of Buffalo. In Hahn, the entry-level age limit of 29 was held constitutional yet as applied to those over the age of 40 constituted a violation of the ADEA because the evidence was insufficient to establish age as a BFOQ. Those persons between the ages of 29 and 40 had no standing to challenge the statute on ADEA grounds because they did not fall

178. See cases cited supra notes 176-77.
179. Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984).
180. Heiar v. Crawford, 746 F.2d at 1200.
181. EEOC v. County of Santa Barbara, 666 F.2d at 376.
182. Hahn v. City of Buffalo, 770 F.2d at 15.
184. See EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984).
185. See Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984).
186. See Heiar v. Crawford, 746 F.2d 1190 (7th Cir. 1984).
188. 770 F.2d 12 (2d Cir. 1985).
190. 770 F.2d at 16.
within the protected age group. This decision effectively leaves those 29 to 40 years old without redress power.

Under Hahn, a police department must hire applicants age 40 or more if the applicants are able to perform the job. The police department, however, is under no obligation to hire those applicants between the ages of 29 and 40, even though the police department would probably prefer to hire these applicants (age 29-40) rather than those applicants over the age of 40. The Second Circuit Court in Doyle v. Suffolk County and its companion case Hettinger v. Nassau County Civil Service Commission specifically addressed this issue. The court stated that when one portion of a statute has been invalidated (in this case, section 58(1)(a) as applied to those person over 40), whether the remaining portion should be considered valid is a question of legislative intent. There is a presumption that the legislature would prefer the remaining portion to continue in effect. The court held that the New York Legislature had made its intent clear that it preferred that “those 29 and older should not be appointed as police officers,” by enacting section 58(1)(a). Therefore, the court held that section 58(1)(a) as applied to those between the ages of 29 and 40 is still valid and would bar any challenge from those applicants in the 29 to 40 age group.

Decisions such as this make little practical sense. Not only is the result illogical, but it is also unfair, because it leaves one particular group of individuals (those 29 to 40) without redress power. It is because of these inconsistencies that the purposes behind entry-level age limits, mandatory retirement provisions and the ADEA should be examined more closely in an attempt to formulate reforms which would allow these statutes to exist harmoniously.

IV. CONCLUSION

Because of the inconsistent and anomalous results reached in this area of the law, serious consideration should be given to balancing two competing interests present in the area of age discrimination and law enforcement personnel. The first interest is that the states need to have safe, effective and efficient police departments. The sec-

191. 596 F. Supp. at 954.
192. See cases cited infra notes 193-94 and accompanying text.
193. 786 F.2d 523 (2d Cir. 1986).
194. Id.
195. Id. at 527.
196. Id. at 528.
197. Id.
198. Id. at 529.
One proposal for reform is to repeal all state statutes pertaining to entry level age limits and mandatory retirement. This would be a drastic reform because it would lift all age limitations on becoming or remaining a police officer. Police departments would be required to make a determination of an applicant or retiree’s ability to perform the duties of a police officer on an individual basis rather than on the basis of age. Consequently, the result of this reform would be consistent with the purpose and goals of the ADEA because it would prevent employment decisions from being made solely on the basis of age.

An additional result of the repeal of statutory age limitations would be an increase in the number of people applying for the position of police officer. Because no age limitation would be imposed, police departments would need to revise their testing and screening procedures for determining a candidate’s fitness, other than on the basis of age. This would include devising more extensive individualized medical testing as well as revising the physical agility exam, in order to determine which candidates are most fit for the position of police officer. This could, however, become burdensome on the state because it would increase the cost of and the time spent in screening candidates.

A second reform would be to have an administrative agency, such as the Equal Employment Opportunity Commission, set forth guidelines for what an employer must prove and the amount of proof necessary to establish age as a BFOQ for police officers. This would remove some of the doubt concerning the quantum of proof necessary to prove a BFOQ because guidelines would be provided to police departments. Additionally, it may reduce the number of inconsistent decisions reached by the courts because the courts would have a uniform guideline to judge individual police departments’ decisions.

Finally, the purpose and goals of the ADEA should be re-examined in light of the current status of the law in this area, and with a recognition that police employment is a unique occupation. The best reform would be for Congress to amend the ADEA to create a statutory BFOQ for entry level age limits and retirement provisions for police officers. Congress would have the best insight into reconciling the concerns of the states and the purpose of the ADEA. Since Congress has set age limitations for federal law enforcement officers,
with a recognition of the need for young physically fit officers, Congress assumably should be able to recognize the same needs of state police departments. Alternatively, Congress could reduce the burden of proof necessary to establish a BFOQ for police employment.

Unless and until some reform measures are taken, the status of entry-level age limits and mandatory retirement provisions will remain at best uncertain.

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